

**ARIZONA SUPREME COURT
CAPITAL CASE OVERSIGHT COMMITTEE
MINUTES
October 05, 2011**

Members Present:

Hon. Michael D. Ryan, Chair
Hon. Douglas Rayes
Kent Cattani, by proxy, John Todd
Donna Hallam
Dan Levey, by proxy, Amy Bocks
Marty Lieberman
James Logan
Daniel Patterson
Hon. Ronald Reinstein

Guests:

Natman Schaye
Elizabeth Walker
Jennifer Garcia
Molly Weinstein
Bruce Peterson
Larry Hammond
Paul Julien
Theresa Barrett

Members not present:

William Montgomery

Staff:

Mark Meltzer
Julie Graber

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1. Call to Order; approval of the meeting minutes. The meeting was called to order at 12:05 p.m. The Chair introduced proxies for Mr. Cattani and Mr. Levey, respectively Mr. Todd and Ms. Bocks. The Chair then asked the members to review the draft minutes of the May 16, 2011 Committee meeting. A member moved to approve those minutes, followed by a second, and the members unanimously approved the May meeting minutes.

2a. Status reports: Maricopa County Superior Court. The Chair invited Judge Rayes to report on the status of capital cases in Maricopa County. Judge Rayes advised that there were sixty-six cases pending as of this week; three of those cases are remands. Five cases are currently in trial. Eight death notices have filed since June 1, and nine capital cases have been resolved in that period. In calendar year 2011 to date, the county attorney filed twenty death notices, and twenty-two capital cases have concluded. Judge Rayes also advised that he and Mr. Logan are working on a quality assurance plan for contract counsel.

Mr. Logan's figures for the number of pending cases varied from those provided by Judge Rayes. Mr. Logan included six cases that are "potential" capital cases in which the time to file a notice has not yet run, and seven cases in which the time to file a death notice has been extended. He also included three cases in which the notice has been withdrawn, but that are still fully staffed with a capital team. One capital case was assigned recently to contract counsel because of the existence of a three-way conflict with the staffed agencies, but those agencies accepted assignments on all the other new cases. Mr. Logan observed that the number of pending cases appears to be leveling off, but because the new county attorney has been in office for less than a year, he cautioned members that it would take additional time to determine what the new "normal" for pending cases will be. Mr. Logan reported that he presently has adequate operating funds.

2b. Status reports: appeals and PCRs. Ms. Hallam advised that there are twenty-seven pending appeals. Fifteen notices of appeal were filed in 2009, ten were filed in 2010, and six have been filed so far in 2011. The Court issued seven opinions in capital cases in 2007, nine opinions in 2008, five in 2009, eleven in 2010, and five so far this year.

There are ten defendants awaiting the appointment of counsel on petitions for post-conviction relief. The oldest case involves a March 2010 opinion on direct appeal. Ms. Hallam surmises that to accommodate the current backlog of PCR cases needing counsel and future PCR cases resulting from the current number of appeals, there should be about fifteen to twenty active counsel. An “active” counsel would be able to take a new PCR every two or three years. About fifteen attorneys have accepted appointments on PCRs from 2009 to the present. This figure does not include two cases that went to the Maricopa County Public Defender.

There are three pending PCRs with lawyers appointed under Rule 6.8(d). These lawyers must associate with other attorneys who are fully qualified under Rule 6.8. The Court does not currently identify the associate attorneys in the appointment orders for these cases. Counsel appointed under Rule 6.8(d) must notify the Supreme Court’s staff attorneys with whom they have associated, and staff can verify that associated counsel is qualified, but staff does not currently contact associated counsel to confirm that they have agreed to render pro bono services in the case, or to confirm their duties.

A discussion of the current appointment process ensued, and members posed the following questions. If Rule 6.8(d) lawyers are required to associate with a Rule 6.8 qualified attorney, should the court appoint a fully qualified attorney on the case instead? Would it be feasible for the county to appoint and to compensate associated counsel on capital PCRs? Mr. Logan said that the county is already spending more money on PCR counsel than previously because of the increased number of post-conviction proceedings, and the county would be reluctant to pay the additional cost of associated counsel without a mandate that it do so.

The discussion then turned to the subject of training for Rule 6.8(d) counsel. Jennifer Garcia, who is with the Federal Public Defender, organizes two full days of training on post-conviction relief in the fall, with supplemental training throughout the year, because of the increasing number of post-conviction proceedings. This training is specifically on capital post-conviction matters, such as PCR procedures, competency, and recent Supreme Court opinions. Attorneys who attend the training are typically from staffed defender offices rather than contract counsel. Questions were asked whether an amendment to Rule 6.8(d) should require this training, or if the appointment order should require that counsel obtain this training. The consensus of the members was that improvements are needed in the appointment and training of Rule 6.8(d) counsel.

3. Search for a new Capital Post-conviction Public Defender. Staff reported that all members of the Nomination Commission have been appointed. The Governor’s office will staff the Commission. The administration has received applications, and the Commission may meet later this month to review them.

4. Discussion concerning the effective assistance of counsel at the PCR stage. Mr. Cattani argued before the United States Supreme Court yesterday in *Martinez vs. Ryan*. The Court also heard argument yesterday in *Maples vs. Thomas*, an Alabama case. Mr. Todd explained that each of these cases involved a procedural default and the loss of an opportunity to raise a constitutional challenge to a conviction because of ineffective counsel. Mr. Hammond said he had reviewed transcripts of these oral arguments, and he believes these reveal an inclination of the Court to require a constitutionally effective lawyer in a post-conviction proceeding.

5. Screening committee. If the Court reaches the holding suggested by Mr. Hammond, applications for PCR counsel may require careful screening. Should the creation of a screening committee abide the opinions in *Martinez* and *Maples*?

Mr. Lieberman, who provided a written proposal for a screening committee, held the view that the Arizona Supreme Court should establish a committee as soon as possible. While the SCOTUS opinions could affect how the committee operates, Mr. Lieberman stated that a committee is required regardless of the outcome in those cases.

The Chair noted that a death penalty project representative of the American Bar Association had recently visited Phoenix, and advised that Ohio has established within the past year a committee that screens capital appointments at all court levels. The screeners also monitor the performance of counsel, and the screeners receive compensation. The following questions were raised: Would such a committee work in Arizona, when the county appoints trial and appellate counsel, and the Supreme Court appoints PCR counsel? How would the committee obtain funding? How would the counties and the Legislature view the creation of a screening committee?

Maricopa County has an ad hoc committee with members from the staffed defender offices whose purpose is to evaluate applicants for appointments on criminal cases. The committee reviews multi-page applications that include a list of references and cases, and it discusses each applicant. The county has various contracts, such as capital appeals, capital trials, and major felonies, and an applicant receives a contract only if they have the appropriate skill level. The award of a contract to an applicant is no assurance that the applicant will get appointments on any case. Mr. Logan would support Mr. Lieberman's proposal, with a few administrative changes, because he believes it will provide the Court with more information before making appointments.

A member suggested that judges who have not practiced criminal law might not have the requisite experience to evaluate applicants, but other members believe that judicial officers should be on the committee, even if they are not voting members. Judge Rayes reminded the members that he and Mr. Logan have a plan for a screening committee for trial counsel in Maricopa County, and that this plan would not be a cost to the county. Mr. Lieberman does not know how many attorneys in Arizona may be qualified to represent defendants on capital PCRs; he added that being qualified means more than the mere number of cases an attorney has handled. Currently in Arizona, no large law firms are engaging in pro bono representation of defendants on capital PCRs, and few if any of those firms employ Rule 6.8 qualified attorneys.

The Chair concluded this discussion by referring the matter to the workgroup consisting of Judge Rayes, Mr. Lieberman, and Mr. Cattani. Ms. Hallam was added to the workgroup.

6 . Report to the Arizona Judicial Council. The Chair stated that the topic of a screening committee for trial and appellate appointments, in additions to appointments on PCRs, will require further study, and that it might be premature to report to the Arizona Judicial Council in December 2011. There are also unknown outcomes that could affect the December report, including the Nomination Commission's appointment of a new statewide capital PCR defender, and the impact of the *Martinez* and *Maples* decisions. The Chair suggested that a request to extend the time to report to the AJC would be appropriate, and the members unanimously concurred. If the Committee obtains an extension to 2012, all of the members present agreed to continue to serve.

It was also noted that based on the leveling off of the number of cases in the Maricopa County Superior Court, the crisis in that court which gave rise to this Committee may be abating. However, the crisis may be transferring to the appellate courts as cases work their way through the judicial system, and the Committee should continue to monitor case volumes.

7. Proposed amendments to A.R.S. § 13-4041. Mr. Todd presented proposed amendments to A.R.S. § 13-4041, which were developed with Mr. Cattani. The proposed amendments would:

- Authorize the appointment of a PCR defender upon certification that the record on appeal is complete, thereby allowing development of the PCR before the appeal is completed;
- Require the appointment of the State Capital PCR PD, or a public defender agency, unless a conflict exists that requires the appointment of private counsel;
- Raise the hourly rate from \$100 to \$175, and the allowable number of hours from 200 to 300, if a case did go to private counsel; and
- Delete sub-section (H), i.e., the provision that allows the county to seek reimbursement from the State for fifty percent of the cost incurred by the county.

Member comments included the following:

- The presentation of mitigation evidence at a PCR hearing while an appeal is pending could be problematic.
- If counsel is appointed on the PCR while the appeal is pending, and the appeal is successful, considerable resources that were spent on the PCR would be wasted;
- Why should a state statute set the hourly rate if the county is going to bear the cost of compensation? The State currently does not set the rate for trial or appellate counsel appointed by the county, and it should not set the rate for PCR counsel either.

Based on the discussion, there was no interest in supporting this proposal.

8. Call to the public; adjourn. In response to a call to the public, Mr. Schaye advised that the problem of screening lawyers for capital cases in Pima County is a serious one. The county's list combines trial and appellate counsel. There is a low rate of compensation and a lack of qualified applicants. He encouraged the members to look beyond PCRs and beyond Maricopa County when considering the establishment of a screening committee.

The meeting was adjourned at 1:35 p.m.